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No. 97-428

IN THE
Supreme Court of The United States

OCTOBER TERM, 1997

AIR LINE PILOTS ASSOCIATION,
Petitioner,

v.

ROBERT A. MILLER, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE MACKINAC CENTER FOR PUBLIC POLICY AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

Of Counsel:

ROBERT P. HUNTER
MACKINAC CENTER FOR PUBLIC POLICY
140 West Main Street
P.O. Box 568
Midland, MI 48640
(517) 631-0900

FRANK T. MAMAT*
J. WALKER HENRY
GEORGE M. MESREY
CLARK HILL P.L.C.
500 Woodward Avenue
Suite 3500
Detroit, MI 48226-3435
(313) 965-8300

Counsel for the Amicus Curiae

*Counsel of Record

Balmar Legal Publishing Services, Washington, D.C., (202) 682-9800

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The Mackinac Center for Public Policy ("Mackinac Center") files this brief *amicus curiae* with the written consent of the parties as provided for in the Rules of this Court.[1]

INTEREST OF THE *AMICUS CURIAE*

The Mackinac Center is a non-partisan research and education organization devoted to improving the quality of life for all Michigan citizens by promoting sound solutions to

[1] No counsel for a party authored this brief *amicus curiae* in whole or in part, and no person or entity, other than the *amicus curiae*, made a monetary contribution to the preparation or submission of this brief.

federal, state and local policy questions. The Mackinac Center's objective is to generate a more sophisticated level of political and economic understanding among Michigan citizens and decision makers. Committed to its independence, the Mackinac Center neither seeks nor accepts any government funding. Instead, it enjoys the support of foundations, individuals and businesses who share a concern for Michigan's future and recognize the important role of sound public policy. The Mackinac Center Board of Scholars consists of some of the country's foremost experts in economics, science, law, psychology, history and related disciplines.

Michigan citizens have been a catalyst in establishing constitutional protections in the area of compulsory union dues. In fact, a significant amount of the Court's jurisprudence on this subject has involved Michigan citizens and unions. Thus, the Mackinac Center is particularly interested in the issues raised in this case and believes that its perspective, information and expertise will assist the Court in deciding the questions presented. The Mackinac Center has conducted extensive research on the impact of compulsory union dues upon employees, employers and labor unions, which culminated in a recently published treatise considered to be one of the most authoritative and comprehensive publications of its kind.[2] In addition, the Mackinac Center has taken an active role in shaping Michigan and national labor policy on this issue. For example, Mackinac Center Director of Labor Policy, Robert P. Hunter, a former member of the National Labor Relations Board (1981-1985), testified before a subcommittee of the United States House of Representatives Committee on Education and the Workforce on January 22, 1998, regarding the impact of compulsory union dues.

The Mackinac Center believes that the Court's decision in this case will have a profound impact on all employees'

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[2] Robert P. Hunter, *A Mackinac Center Report: Compulsory Union Dues in Michigan*, (1997).

ability to exercise their statutory and constitutional rights in the workplace, and asserts that the District of Columbia Circuit Court of Appeals decision below strikes the proper balance between the competing interests represented by the parties in this case and should be affirmed. Thus, the Mackinac Center submits this brief *amicus curiae* in support of Respondents and the decision of the court of appeals below.

PRELIMINARY STATEMENT

The Court granted the Petition for a Writ of Certiorari to consider the following question:[3]

> When nonunion employees wish to challenge the agency fee they are required to pay under an agency-shop agreement, must they exhaust the "impartial decision maker" procedure mandated by this Court's decision in *Chicago Teachers Union, Local #1 v. Hudson*, 475 U.S. 292 (1986), before bringing their claim to court?

The relevant facts in this case are straightforward and set out at length by the court of appeals below.[4] The Air Line Pilots Association ("ALPA" or "Petitioner") is the exclusive bargaining representative of all pilots ("Pilots" or "Respondents") employed by Delta Airlines ("Delta"). In 1991, ALPA and Delta entered into an agency shop collective bargaining agreement ("CBA") under the Railway Labor Act ("RLA")[5] which requires all Delta Pilots who choose not to be union members to pay a service charge to ALPA "as a contribution for the administration of the [collective bargaining agreement] and the representation of [all]

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[3] *Air Line Pilots Association v. Miller*, ___ U.S. ___, 118 S.Ct. 554 (1997).

[4] *Miller v. Air Line Pilots Association*, 108 F.3d 1415 (D.C. Cir. 1997).

[5] 45 U.S.C. §§ 151-88.

employees." In conjunction with the agency shop agreement, ALPA unilaterally devised and implemented written "Policies and Procedures Applicable to Agency Fees" ("Union Policy"). Under the Union Policy, ALPA calculates, on a yearly basis, which of its expenditures it believes are germane to collective bargaining and which are not and reports those findings in a "Statement of Germane and Nongermane Expenses" ("SGNE"). The SGNE sets forth germane and nongermane project codes and indicates how much money was spent on each code. The SGNE does not, however, provide objecting employees with any precise information concerning ALPA's expenditures.

If a nonmember Pilot objects to ALPA's use of agency fees for purposes not germane to collective bargaining, ALPA will reduce the objector's fees by a predetermined amount (as calculated by ALPA). If the objecting employee protests the predetermined calculation, ALPA will unilaterally initiate arbitration proceedings under its Union Policy. The arbitration is conducted pursuant to the American Arbitration Association ("AAA") Rules for Impartial Determination of Union Fees. At the request of ALPA, AAA will select an arbitrator from "a special panel of arbitrators experienced in employment relations." The Union Policy affords the objecting employee no opportunity to participate in the arbitrator selection process. More importantly, an objecting employee is forced to submit his or her dispute to the arbitrator *prior* to initiating an action in federal court. ALPA will pay for the cost of the arbitration but not for the objecting employee's attorneys fees. ALPA has never allowed the Pilots any role in formulating the Policy, and significantly, none of them ever agreed to be bound by its provisions.

In the instant case, a number of nonmember Pilots were dissatisfied with the procedures in the Union Policy as well as the propriety of 1992 SGNE calculations/designations and they complained to ALPA about it. ALPA reacted by unilaterally initiating arbitration proceedings. In response, some of the nonmember Pilots joined together and filed a

lawsuit against ALPA in federal district court seeking judicial resolution of their fee dispute. Additionally, they requested the arbitrator not to proceed but he refused. Thereafter, the Pilots filed a motion for a preliminary injunction with the district court seeking to enjoin the arbitration proceeding, but it too was denied.

Prior to the arbitration hearing, the Pilots sought discovery in order to properly evaluate ALPA's summary data concerning germane/nongermane expenditures but the arbitrator refused to exercise the authority he possessed under the AAA rules to permit this critical process. Thus, the only evidence before the arbitrator was summary data created and generated by ALPA which reflected only general categories of union spending and not the specific expenditures. Without discovery, the Pilots had no way of determining the accuracy, honesty or even the calculation used in reporting the expenditures. Not surprisingly, the arbitrator subsequently sustained most of the challenged union fee determinations as being germane to collective bargaining.

The district court thereafter granted ALPA's motion for summary dismissal of the Pilots' claim that ALPA breached its duty of fair representation by failing to properly calculate its germane and nongermane expenses.[6] The district court did not review the arbitrator's findings of fact de novo but instead, evaluated them based merely on a "clearly erroneous" standard. The district court also rejected the Pilots' argument that ALPA could not unilaterally force them to arbitrate their claims pursuant to the internal union procedure before bringing an action in federal court.

The court of appeals reversed the district court's decision holding, *inter alia*, that the pilots were *not* required to submit their fee dispute to the ALPA arbitration procedure before bringing an action in federal court. In reaching this decision, the court of appeals stated:

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[6] *Miller v. Air Line Pilots Association*, No. CIV.A. 91-3161(NHJ), 1995 WL 864556 (D.D.C. Aug. 30, 1995).

> " . . . we simply see no legal basis for forcing into arbitration a party who never agreed to put his dispute over federal law to such a process. Nor is there anything in the Hudson majority opinion that even suggests that the Court thought it was putting protesting agency shop employees in that position. We therefore align ourselves with the Sixth and Third Circuits in holding that an employee who wishes to bring an action in federal court is not obliged to proceed first to arbitration, at the union's option." *Miller*, 108 F.3d at 1421.

SUMMARY OF ARGUMENT

The Mackinac Center is a staunch advocate of employee rights. Therefore, it is particularly concerned about the destruction of employees' rights, whether it be by unions, employers or the government. The first argument centers on the Mackinac Center's belief that the central purpose behind *Hudson* was to protect employees' rights. The exhaustion of internal union remedies requirement advocated by Petitioner and its *amici curiae* is contrary to this Court's stated objective in *Hudson* to broaden the constitutional protections for employees subject to agency shop agreements. Therefore, the Mackinac Center contends that any exhaustion requirement would be a step backward and seriously undermine the positive protection and impact that *Hudson* has had upon employees' constitutional and statutory rights.

The second argument advanced by the Mackinac Center originates from the same pro-employee ideological perspective. Simply stated, due to the unique nature of agency fee disputes, an exhaustion requirement would likely discourage individual employees from pursuing their constitutional and statutory rights against the greater resources of the Unions, and in many cases, only serve to "exhaust" the employee and effectively prevent judicial review. These risks are magnified ten-fold in the instant case because the internal union procedure here, which was never

agreed to by Respondents, is inherently one-sided and provides no safeguards to assure a fair and cost effective forum for objecting employees to resolve agency fee disputes.

The Mackinac Center further contends, in accord with the decision of the court of appeals below, that there is no legal basis whatsoever for forcing a party to participate in a one-sided arbitration procedure when it never agreed to do so in the first place. This simple principle is well grounded in the jurisprudence of the Court and should be applied in the instant case to prevent a mandatory exhaustion requirement.

Finally, the Mackinac Center urges the Court to use this case as an opportunity to clear up the law pertaining to the constitutional impact of union security agreements upon private sector employees covered by the NLRA.[7] As described in detail below, the Mackinac Center believes that there is no difference in the government action present through the imposition of agency fee agreements whether it is imposed upon employees by the RLA or the NLRA. Thus, the Court should conclude that all agency fee agreements authorized and perpetuated by federal labor law constitute state action and should be subject to constitutional scrutiny.

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[7] 29 U.S.C. §§ 151-69.

ARGUMENT

I.

THE EXHAUSTION OF REMEDIES REQUIREMENT ADVOCATED BY THE PETITIONER IS HARMFUL TO EMPLOYEE RIGHTS AND INIMICAL TO THE LEGAL AND POLICY CONSIDERATIONS WHICH LED THE COURT TO ADOPT THE CONSTITUTIONAL SAFEGUARDS FOR COLLECTION OF AGENCY FEES IN *HUDSON*

The rights contained in the First Amendment[8] are among the most fundamental tenets of a free society. As this Court has acknowledged,

> " . . . at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and conscience rather than coerced by the State." *Hudson*, at 302 n.9.

Closely intertwined with the First Amendment is the longstanding federal labor policy of *voluntary* unionism. See, e.g., *Patternmakers' League of North America AFL-CIO v. NLRB*, 473 U.S. 95 (1985). In fact, the great leader of the American labor movement, Samuel Gompers once wrote that:

> "[t]here may be here and there a worker who for certain reasons unexplainable to us does not join a union of labor. This is his right, no matter how

[8] The First Amendment to the Constitution of the United States provides as follows:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

> morally wrong he may be. It is his legal right and no one can dare question his exercise of that legal right." Florence Calvert Thorne, *Samuel Gompers-American Statesman* 24 (1957).

The late George Meany, the legendary and fiery president of the AFL-CIO (an *amicus curiae* in this case), later said of Gompers on this issue, "[h]e founded the American Federation of Labor on the bedrock of voluntarism." George Meany, *Foreword to Samuel Gompers, Seventy Years of Life and Labor* (1957).

This notion of freedom of association is the fundamental underpinning of the concept of voluntary unionism and led Congress, through passage of the Taft-Hartley Act in 1947,[9] to reject the Wagner Act's regime of compulsory unionism. *Communication Workers v. Beck*, 487 U.S. 735, 755 (1988). This critical policy decision was the product of extensive hearings wherein Congress determined that the closed shop and the abuses associated with it "created too great a barrier to free employment to be longer tolerated." *Beck*, 487 U.S. at 748 (citing from S.Rep. No. 105, 80th Cong., 1st Sess., 6 (1947) (S.Rep.), Legislative History of the Labor Management Relations Act, 1947 (Committee Print compiled for the Senate Committee on Labor and Public Welfare, p. 412 (1974)(Leg.Hist.). In 1951, Congress amended the Railway Labor Act to extend "to railroad labor the same rights and privileges of the union shop that are contained in the Taft-Hartley Act." *Beck*, at 487 U.S. at 746 (citing from 96 Cong.Rec. (1951) - remarks of Rep. Brown).

Congress and the Court have acknowledged that agency shop agreements and their inherent requirement that objecting employees still financially support their collective bargaining representative, significantly shrink employees' First Amendment and statutory rights. See, e.g., *Lenhert v. Ferris Faculty Association*, 500 U.S. 507, 516 (1991) (constitutional

[9] 29 U.S.C. § 141 *et. seq.*

rights); *Beck*, 487 U.S. at 755 (statutory rights). In this regard, the *Lenhert* Court observed that:

> "[u]nions have traditionally aligned themselves with a wide range of social, political, and ideological viewpoints, any number of which might bring vigorous disapproval from individuals. To force employees to contribute, albeit indirectly, to the promotion of such positions implicates core First Amendment concerns." *Lenhert*, 500 U.S. at 516.

However, Congress and the courts have allowed limited interference with employees' constitutional and statutory rights through the imposition of agency shop agreements in order to promote the government's policy interest in securing labor peace through the elimination of the "free rider" problem that would otherwise accompany union recognition. See, e.g., *Lenhert*, 500 U.S. at 516, 520-21; *Hudson*, 475 U.S. at 301-02.

Acknowledging the harmful impact that agency shop agreements have had upon employee rights, the Court has determined that both the RLA and the NLRA authorize the exaction of *only* those fees and dues necessary to "performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues." *Beck*, 487 U.S. at 762-63. Thus, a union is prohibited from collecting from objecting employees any sums for the support of ideological causes not germane to its duties as collective bargaining agent. *Hudson*, 475 U.S. at 294. While he may have been slightly before his time, even Thomas Jefferson commented nearly two centuries ago that "[t]o compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical." I. Brant, *James Madison: The Nationalist* 354 (1948).

This concept of the sanctity of individual employees' constitutional and statutory rights is at the very heart of the Court's decision in *Hudson*. As the *Hudson* Court acknowledged,

> "[P]rocedural safeguards often have special bite in the First Amendment context. . . . The purpose of these safeguards is to insure that the government treads with sensitivity in areas freighted with First Amendment concerns." *Hudson*, 475 U.S. at 303 n.12.

Because of the destruction of employees' constitutional rights inherent in agency shop agreements, the *Hudson* decision expanded the protection of employee rights by imposing the following constitutional requirements upon *unions* that insist upon collecting agency fees: (1) the *union* must provide an adequate explanation for the basis for the fee assessed; (2) the *union* must provide employees with a reasonably prompt opportunity to challenge the amount of the fee before an impartial decision maker; and (3) the *union* must provide an escrow for the amounts reasonably in dispute while the fee dispute is pending. *Hudson*, 475 U.S. at 310 (emphasis added).

ALPA and its *amici curiae* misconstrue the purpose of the constitutional requirements set forth in *Hudson* for the collection of agency fees. Specifically, by arguing that the Court should interpret the "impartial decision maker" requirement to impose an obligation upon the individual employee to exhaust internal union-devised complaint procedures *before* seeking redress for constitutional violations in the federal courts, they are asking this Court to retreat from the very reason that it issued the *Hudson* decision: namely *fundamental fairness* and *protection of employee rights*. It is most telling that Petitioner concedes on page 22 of its Brief that "**...it is, after all, to their** [referring to the Respondent employees] **advantage to have a choice of forums**." The Mackinac Center posits that the constitutional protections created in *Hudson* **should** be interpreted to protect employees. Most notably, it is employees' constitutional and statutory rights that are restricted through the imposition of agency shop agreements and it is *their* money that is being used for political and ideological positions that they might find

abhorrent. Thus, imposing the extreme requirement of exhaustion of remedies upon employees with limited resources is contrary to the precise reasons this Court issued the *Hudson* decision and would be an affront to the fundamental principle of voluntary unionism. The court of appeals below refused to allow this to happen commenting "[n]or is there anything in the *Hudson* majority opinion that even suggests that the Court thought it was putting protesting agency shop employees in that position." *Miller*, 108 F.3d at 1421.

ALPA and its *amici curiae* nonetheless argue that, since the constitutional requirements set forth in *Hudson* are judicially created, this Court should exercise its discretion and impose the inherently punitive and oppressive requirement that objecting employees must *first* submit their disputes to internal union-dominated arbitration procedures in order to retain their right to *later* sue in federal court. The Mackinac Center agrees that, in the absence of an explicit Congressional mandate requiring exhaustion, sound judicial discretion governs. See, e.g., *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992). However, the Mackinac Center strenuously disagrees with the argument that exhaustion should be imposed in constitutional and statutory agency fee disputes, especially when the "internal remedy" is one-sided and unilaterally promulgated and totally administered by the alleged wrongdoer. Instead, the Mackinac Center urges the Court to exercise its discretion not to impose an exhaustion requirement. To conclude otherwise would seriously jeopardize the protections already extended to employees in *Hudson* by the Court.[10] Surely, setting up another roadblock

[10] Many of the arguments raised by the Petitioner and its *amicus curiae* in support of exhaustion directly or indirectly involve speculative "institutional inconveniences" that labor unions might have to endure if employees have the choice between utilizing internal union procedures or filing directly in federal court. Simply stated, these inconveniences pale in comparison to the chilling effect upon employees' statutory and constitutional rights that would occur if exhaustion was required. Moreover, it is disingenuous to argue that the minor inconveniences that might occur would significantly hamper a union's ability to properly represent its members.

to the protection of the federal courts for the constitutional and statutory rights involved here hardly serves to enhance employee rights. In fact, as discussed below, it is likely that shackling employees with Petitioner's arbitration procedure without mutual agreement as to who will decide the dispute and without a meaningful opportunity for discovery will discourage or prevent them from exercising their rights at all.

II.

IMPOSING AN EXHAUSTION OF INTERNAL REMEDIES REQUIREMENT IN AGENCY FEE DISPUTES SLANTS THE PROCESS IN FAVOR OF UNIONS AND HINDERS EMPLOYEES FROM ASSERTING THEIR CONSTITUTIONAL AND STATUTORY RIGHTS

The Mackinac Center contends that requiring an exhaustion of internal remedies in this case would discourage and/or prevent employees from exercising their constitutional and statutory rights. It takes fortitude and strength of conviction for individual employees to stand up to a union, co-workers, and sometimes even family members, especially in light of the fact that most employees have a significant amount of time, emotional energy and personal dignity invested in their jobs and their relationships in the workplace. Moreover, their employers may be outwardly hostile to their efforts or, at best, hesitant to provide support for fear of angering the union or meddling in "internal union affairs." Thus, employees who object to a union's use of their dues for personally offensive ideological or political views often find themselves in a precarious position, opposed by the union, the employer and fellow employees. Significantly, such agency fee objectors almost find themselves in an even darker "no-man's-land" than the striker who crosses the picket line to

return to work while the strike continues: a person with legal rights and beliefs, mistrusted and abused by his Union, his employer and his peers.

In light of these workplace realities, the practical effect of imposing an exhaustion requirement when the internal union arbitration procedure is so one-sided in its design and application would be that many employees would be intimidated and elect not to exercise their right to object at all. An employee who has made the courageous decision to object may reasonably view the prospect of suffering through an intrusive arbitration procedure unilaterally devised and imposed by the union as not worth the emotional and mental anguish that would likely result. Thus, there is a significant chance that the only practical effect of imposing an exhaustion of internal remedies requirement in this case would be to "exhaust" objecting employees and effectively prevent them from seeking judicial redress for constitutional and statutory violations. *NLRB v. Marine and Shipbuilding Workers*, 391 U.S. 418, 425 (1968).

Moreover, while under *Hudson* a union must provide (and pay for) an impartial decision maker,[11] the ALPA arbitration procedure effectively requires employees, as a practical matter, to hire and pay for their own counsel in order to have any reasonable chance of properly presenting their case and preserving their rights for a subsequent challenge in federal court. This would be expensive and in many cases,

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[11] This also raises the issue of whether the Petitioner's process for unilaterally selecting an arbitrator is appropriate. The court of appeals below stated "[i]t may well be that, for instance, that the arbitrators chosen by the AAA from a group 'experienced in labor matters' would not be perceived as typically sympathetic to such plaintiffs (or their counsel)." *Miller*, 108 F.3d at 1421. Moreover, ALPA's unilateral determination as to the method for selecting the arbitrator defies an essential element of arbitration "that the selection of the particular arbitrator or the method of selection of an arbitrator be established by mutual agreement between the parties." *Bethlehem Mines Corp. v. Mine Workers*, 344 F.Supp. 1161. 1165 (W.D. Pa. 1972), *aff'd*, 494 F.2d 726 (3d Cir. 1974).

deplete an employee's financial resources to the point where a challenge in federal court would not be possible.

This problem is exacerbated by the limited availability of discovery in the arbitration policy adopted by Petitioner. In order to have a meaningful arbitration process to determine agency fees, the employee must have access to union records in order to assess the propriety of the union's allocations and not just summary data. The Court should note that, in the instant case, the arbitrator denied Respondents discovery in the arbitration proceeding. Compounding this problem further is the danger that the factual basis for the arbitration award may not be reviewed de novo by a federal court. This could lead to an employee being essentially "frozen out." Because of these dangers, an employee would be foolish to participate in Petitioner's arbitration procedure without the assistance of counsel. Even with the assistance of counsel, however, the arbitration procedure as it currently stands is impermissibly slanted in favor of Petitioner.

Thus, unless employees are provided with the option of using union arbitration procedures and/or proceeding directly into federal court, there is a significant chance that they will be discouraged and/or ultimately prevented from exercising their constitutional and statutory rights. Practically speaking, most objecting employees probably only have enough emotional and financial capital to make their fight *one* time in *one* forum and it should be the forum of *their* choice, not that of the Union. As the court of appeals below observed in response to Petitioner's "institutional convenience" arguments, it is not inconceivable, given the disincentives both sides face, that objecting employees could be persuaded to use the arbitration procedures in lieu of a court challenge if they were given more say in the selection of the arbitrator and the development of the rules for discovery options and regulating the proceeding. *Miller*, 108 F.3d at 1421. However, under the arbitration procedure devised by Petitioner in the instant case, objecting employees have no

input whatsoever and are disadvantaged by the one-sided rules and regulations ALPA has unilaterally imposed.

III.

THE DISTRICT OF COLUMBIA CIRCUIT'S CONCLUSION THAT A UNION CANNOT UNILATERALLY FORCE AN EMPLOYEE TO ARBITRATE HIS OR HER FEE DISPUTE CLAIM IS THE PROPER LEGAL INTERPRETATION OF THE "IMPARTIAL DECISION MAKER" PROCEDURE FORMULATED IN *HUDSON*

It is a fundamental principle of federal labor law that a party can never be compelled to submit its dispute to arbitration unless it has expressly agreed to do so. E.g. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995); *AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 648-49 (1986); *Gateway Coal Co. v. Mine Workers*, 414 U.S. 368, 374 (1974). This axiom recognizes that arbitrators derive their authority to resolve disputes only from the parties' agreement allowing them to do so. *Gateway Coal*, 414 U.S. at 374. In addition, as Respondents are not members of ALPA, they are "not bound by contract with the union to exhaust any formal internal union appeals before resorting to a judicial forum." *Soho Segarra v. Sea-Land Serv., Inc.*, 581 F.2d 291, 295 (1st Cir. 1978). Moreover, nonmember status was the crucial fact in *Patternmakers* which led the Court to rule that a union cannot apply its internal disciplinary rules to individuals who have resigned from the union. *Patternmakers*, 473 U.S. at 106.

In the instant case, the arbitration procedure devised by Petitioner was unilaterally implemented and imposed without any input whatsoever from the nonunion Respondents. At no point did Respondents consent to arbitration of disputes over the use and calculation of agency fees. Therefore, the court of appeals below rejected Petitioner's arguments and correctly held that there is no legal basis for forcing Respondents to

participate in Petitioner's arbitration procedure since they never agreed to submit their dispute over federal law to such a process. *Miller*, 108 F.3d at 1421.

This conclusion is in accord with those of other circuits as well. The Sixth and Third Circuits have concluded in public sector cases that a labor union cannot force an objecting employee to exhaust internal union remedies before filing an action in federal court. *Bromley v. Michigan Education Association-NEA*, 82 F.3d 686 (6th Cir. 1996); *Hohe v. Casey*, 956 F.2d 399 (3d Cir. 1992). Likewise, the District of Columbia Circuit and the Sixth Circuit have reached the same conclusion in duty of fair representation cases under the NLRA. *Abrams v. Communications Workers*, 59 F.3d 1373 (D.C. Cir. 1995); *United Food and Commercial Workers, Local 951 v. Mulder*, 31 F.3d 365, 367-68 (6th Cir. 1994).[12] The Mackinac Center urges this Court to adopt the legal reasoning in these decisions and give employees the meaningful ability to fully exercise their constitutional and

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[12] The NLRB recently announced that it has selected a pending case for accelerated review which addresses the same issues pending before this Court in the hope that the Court will have the benefit of its input in rendering its decision. 15 *Daily labor Report* (BNA) A-2, A-3, (Jan.23, 1998) (*Kroger, Inc.*, Case No. 9-CA-31116 and *United Food & Commercial Workers, Local 1099*, Case No. 9-CB-8672). While an administrative law judge's decision is not binding on the NLRB or this Court, it is noteworthy that, in concluding that the exhaustion requirement violates the duty of fair representation, the administrative law judge wrote:

> "It follows, as a matter of basic fairness, that the union should not be able to frustrate and interfere with those rights by erecting procedural obstacles. In my opinion, requiring core members to observe an internal union appeals process as a precondition to impartial consideration of reduced fee protests is unlawful, and, under those circumstances, continuing to receive dues under the check-off provisions of the contract violates Section 8(b)(1)(A) and (2) of the Act." 15 *BNA Daily Labor Report* at A-3.

The Mackinac Center believes that this passage is directly on point and urges that this Court adopt the same rationale in the instant case.

statutory rights. While arbitration can be beneficial in certain situations, the lack of mutual consent and the inability to discover essential information to properly prepare for the hearing, in the instant case, creates a tribunal which is contrary to the concept of fundamental fairness and is legally defective.

IV.

THE COURT SHOULD DETERMINE THAT THE STATUTORY IMPOSITION OF AN AGENCY SHOP AGREEMENT CONSTITUTES GOVERNMENT ACTION AND THUS, EMPLOYEES SUBJECT TO SUCH AGREEMENTS ARE PROTECTED BY THE CONSTITUTION REGARDLESS OF WHETHER THEY WORK IN THE PUBLIC OR PRIVATE SECTOR AND REGARDLESS OF WHICH FEDERAL LABOR LAW REGULATES THE INDUSTRY IN WHICH THEY ARE EMPLOYED

The Mackinac Center has an active interest in private and public sector labor issues and advocates uniformity in the law whenever appropriate. This case raises a fundamental problem with the current state of the law in regard to agency shop agreements. Specifically, this is a private sector duty of fair representation case governed by the RLA. Yet, the issue upon which the Court granted the writ of certiorari involves the public sector and constitutional questions. Mackinac Center sees no practical or legal distinctions between agency shop agreements in the private and public sectors which would justify denying constitutional protections to private sector employees. The law, as it currently stands, is fractured and leads to contradictory results. Thus, your *amicus curiae* urges the Court to use this case as a vehicle to clear up the legal inconsistencies in the interpretation of agency shop agreements and properly conclude that state action is involved whenever federal law allows the imposition of such agreements.

In *Railway Employees Dept. v. Hanson*, 351 U.S. 225, 232 (1956), the Court acknowledged that

> "[t]he enactment of the federal statute authorizing union shop agreements is the governmental action upon which the Constitution operates, though it takes a private agreement to invoke the federal sanction."

The *Hanson* Court went on to point out that, since the RLA expressly allows union shop agreements notwithstanding state law to the contrary, the RLA has the imprimatur of federal law upon it. *Hanson*, 351 U.S. at 232. In a footnote, the Court commented that "[t]he parallel provision in s 14(b) of the Taft Hartley Act ... makes the union shop agreement give way before a state law prohibiting it." *Hanson*, 351 U.S. at 232 n.5.[13] As the *Beck* Court pointed out, however, the question of whether the NLRA invokes state action has not been definitively ruled on. *Beck*, 487 U.S. at 761-62.

The reality is that governmental action is plainly behind all union security arrangements authorized by federal law, whether they draw their authority from the RLA or the NLRA and regardless of the private or public nature of the employer involved. Since collective bargaining is mandated by the RLA and the NLRA, any agreement, including a union security provision, entered into between an employer and a union is the product of state action. Charles W. Baird, "The Permissable Uses of Forced Union Dues: From Hanson to Beck," *Policy Analysis* 174, at 12-13 (July 24, 1992). Employees in states which have not enacted right to work legislation pursuant to Section 14(b) of the NLRA are in exactly the same situation as private sector employees covered by the RLA. This is clear since the Court held in *Beck* that the union security provisions

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[13] Section 14(b) of the NLRA (29 U.S.C. §164(b)) states as follows:

Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

under the RLA and the NLRA and should be interpreted identically. *Beck*, 497 U.S. at 762-63.

In sum, a determination that there is sufficient state action whenever federal law sanctions an agency shop agreement would clarify the law in this area and provide employees, employers and unions with certainty in conducting their affairs. It should be noted that the National Education Association has alluded to this problem in footnote 2 of its Brief as an *amicus curiae* on behalf of the Petitioner. Moreover, inasmuch as the NLRB has slated a case for accelerated review so the Court will have the benefit of its views when deciding this case, the time is right to finally rule on this issue. See n.12, *supra*.

CONCLUSION

Contrary to the position urged by Petitioner and its *amici curiae*, allowing employees to exercise their constitutional and statutory rights to the fullest extent possible is certainly not anti-union. Instead, it is pro-employee. This principle of employee rights was the underlying reason the Court adopted the constitutional safeguards in *Hudson* and it should be the Court's focus in the instant case. Thus, for the reasons set forth in this Brief, and upon the entire record, the judgment of the court of appeals below should be affirmed

Respectfully submitted,

CLARK HILL P.L.C.

By:
Frank T. Mamat
J. Walker Henry
George M. Mesrey
500 Woodward Avenue
Suite 3500
Detroit, Michigan 48226-3435
(313) 965-8300
Attorneys for *Amicus Curiae*
Mackinac Center for Public Policy

*Counsel of Record

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